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No. 14-1175

In the
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This suit, in which a private citizen has haled the sovereign taxing authority of California into Nevada state court against its will, has dragged on for seventeen years, imposing untold costs upon California even before accounting for the damages awarded below. And there is no end in sight—unless this Court grants certiorari and reaffirms or reestablishes key principles of sovereign immunity. Hyatt provides no principled reason to deny review of the exceptionally important questions presented here.

As to the first question, Hyatt effectively concedes a split over discretionary-function immunity, and rests his opposition on the claim that there is no federal issue for this Court to review. But it is well established that where, as here, a state court's construction of state law is premised on a misconception of federal law, this Court may review the mistaken understanding of federal law. As to the second question, Hyatt concedes that there is a federal issue, but then argues for a toothless version of comity and full faith and credit inconsistent with the principles this Court set forth—at Hyatt's own urging—in *Franchise Tax Board of California v. Hyatt* (*Hyatt I*), 538 U.S. 488 (2003). If sovereign States can be haled into their sister sovereigns' courts by citizens of those States, the minimum protection they need is to be afforded the same immunities as the sister sovereign. If comity and full faith and credit do not provide even that minimal protection, then the need to revisit *Nevada v. Hall*, 440 U.S. 410 (1979), is truly acute. As to that third question, Hyatt offers only a perfunctory defense of *Hall*'s reasoning, relying

instead on *stare decisis*. But almost every *stare decisis* consideration militates against preserving *Hall*, an aberration in this Court's modern sovereign immunity doctrine. At the very least, with forty States, including Nevada, asking this Court to overrule *Hall*, the question surely merits plenary consideration.

I. This Court Should Grant Review To Determine Whether The Federal Discretionary-Function Immunity Rule Is Categorically Inapplicable To Intentional Torts And Bad-Faith Conduct.

Effectively conceding the split of authority on the scope of discretionary-function immunity, Hyatt offers only one argument against review of the first question presented: the Nevada Supreme Court's "interpretation of [NRS §41.032(2)] raises no question of federal law for this Court to review." Opp.13. Hyatt is incorrect.

It is "well established" that "this Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law." *Three Affiliated Tribes v. Wold Eng'g*, 467 U.S. 138, 152 (1984). Thus, in *Three Affiliated Tribes*, the Court fully acknowledged—as Hyatt argues, Opp.10—that it ordinarily defers on "question[s] of state law over which the state courts have binding authority." 467 U.S. at 151. But it added an equally important caveat that Hyatt essentially ignores: this Court has jurisdiction "[i]f the state court has proceeded on an incorrect perception of federal law," or its "interpretation of" a state statute "rest[s] on a misconception of federal law." *Id.* at 152-53; *see*

Michigan v. Long, 463 U.S. 1032, 1040-41 (1983) (jurisdiction when "state court decision fairly appears ... to be interwoven with the federal law" such that "independence" of state-law ground is unclear). The Court reaffirmed these principles in *Ohio v. Reiner*, 532 U.S. 17 (2001), adding that it also has "jurisdiction over a state-court judgment that rests, as a threshold matter, on a determination of federal law." *Id.* at 20.

Under these well-established principles, there is clearly a question of federal law for this Court to review. In construing Nevada's discretionary-function immunity statute, the Nevada Supreme Court relied solely on the "federal two-part test for determining the applicability of discretionary-function immunity" under 28 U.S.C. §2680(a), which the court had previously adopted for construing Nevada's "practically identical" provision. App.14-15; *Martinez v. Maruszczak*, 168 P.3d 720, 727 n.29 (Nev. 2007). That federal two-part test derives from this Court's decisions in *Berkovitz v. United States*, 486 U.S. 531 (1988), and *United States v. Gaubert*, 499 U.S. 315 (1991). The Nevada court thoroughly reviewed the federal test, App.15, 17-18, looked exclusively to federal circuit decisions to determine whether the federal test encompasses bad-faith conduct or intentional torts, App.19-23, observed that the federal circuits have split over "how broadly [they] apply" this Court's decisions articulating the federal test, App.24, and followed the minority approach, *id.*; IMLA Br.9-12.

In every relevant respect, therefore, the Nevada court's construction of NRS §41.032(2) was interwoven with its (mis)perception of federal law—specifically,

the interpretation and applicability of the federal *Berkovitz-Gaubert* test. Accordingly, there is a federal issue this Court may review. *See, e.g.*, *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982) ("[T]he fact that the state court relied to the extent it did on federal grounds requires us to reach the merits.").

Hyatt suggests that *Three Affiliated Tribes* is limited to circumstances where a state court simply treated federal law as "'an affirmative bar to the exercise of jurisdiction,'" Opp.12 (quoting 467 U.S. at 155), and *Long* is limited to circumstances where a state court simply "applied federal law." *Id.* But nothing in those decisions or common sense indicates those limits. If a state-court decision is premised on a misconstruction of federal law, this Court has the final word on the proper construction of federal law and has jurisdiction to correct the mistake.

Hyatt further argues that the "commonplace practice" of looking to decisions interpreting similar statutes "does not turn state law into federal law." Opp.10. True enough, but there is a critical difference between a state-court decision considering federal-court decisions as persuasive authority, and a state-court decision adopting federal law as the state-law standard to obtain the benefit of more developed federal law. In the latter circumstance, which this case involves, it is "well established" that this Court can correct a misconstruction of federal law.

That feature distinguishes Hyatt's leading case, *Johnson v. Fankell*, 520 U.S. 911 (1997). There, the issue was whether a state court construing state law "must follow the federal construction" of the term "final decision" in 28 U.S.C. §1291. *Id.* at 916. The

Court held, unsurprisingly, that the state court had "a choice" whether to adopt the federal standard as its own. *Id.* at 918. But once a state chooses to adopt federal law, its interpretations of federal law are not immune from this Court's review. Here, the Nevada Supreme Court exclusively premised its decision on an interpretation of federal law that has split the circuits. Hyatt's contention that addressing that misinterpretation of federal law is beyond this Court's jurisdiction is wrong, and he offers no other argument against review of this important question.[1]

II. This Court Should Grant Review To Determine Whether Comity And Full Faith And Credit Principles Require A State To Extend To Sister States The Same Immunities It Enjoys In Its Own Courts.

Unlike the first question presented, Hyatt fully acknowledges that the second question presented raises federal issues this Court may review. Hyatt contends instead that principles of comity and full

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[1] Hyatt's tepid contention that there is a "serious question" regarding jurisdiction under 28 U.S.C. §1257(a), Opp.9 n.1, lacks merit. This Court may review state-court decisions "in which there are further proceedings—even entire trials—yet to occur ... but where ... the federal issue is conclusive," or where "the federal issue ... will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 479-80 (1975). Immunity questions are classic examples of issues satisfying the *Cox* standard. Two of the three questions presented here would end this case if decided for FTB; all will survive regardless of future proceedings that may be unnecessary. Exercising jurisdiction clearly would "avoid 'the mischief of economic waste and of delayed justice.'" *Id.* at 477-78. The Court recognized these principles in granting review of the interlocutory petition in *Hyatt I*.

faith and credit do not require Nevada to grant a sister sovereign involuntarily haled into Nevada courts the same immunities Nevada enjoys. That argument largely ignores the equal-treatment premise that, at Hyatt's urging, *Hyatt I* embraced. Pet.21. But if Hyatt is correct and federal law does not require Nevada to treat sister sovereigns at least as well as Nevada treats its own agencies, then the regime of *Nevada v. Hall* is truly unsustainable. *Hall* itself hinted that its rule might not apply to taxing authorities, which tend not to be popular even in home-state courts. 440 U.S. at 424 n.24. *Hyatt I* rejected that proposition, but softened the blow by more than hinting that FTB would be entitled to at least the protections Nevada affords its own state actors. 538 U.S. at 498-99. If neither of those principles holds true, as Hyatt now insists, then a sovereign State is truly at the mercy of a sister sovereign when haled into court by a private citizen against its will. That proposition is antithetical to the constitutional design and this Court's post-*Hall* sovereign immunity decisions.

Hyatt has no real response to the Nevada Supreme Court's failure to "rely[] on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." *Id.* at 499. Indeed, his efforts at defending the analysis below only underscore that the decision below lacked a "healthy regard for California's sovereign status." *Id.*; Pet.24-25. Hyatt emphasizes that the Nevada court refused to grant FTB the protections given a Nevada agency because California's officials are not "subject to legislative control, administrative oversight, and public accountability *in Nevada*." Opp.15 (emphasis

added). Of course not; but California agencies are subject to all those checks *in California*. And if respect for a sister sovereign means anything, it means respecting the governmental processes of the sister State, not dismissing them because they will occur in Sacramento rather than in Carson City. Indeed, a sister sovereign's agencies will never be subject to substantial legislative control and oversight in *Nevada*, so the decision below is a recipe for never extending comparable immunity to a sister sovereign. That is hardly the "healthy regard" envisioned in *Hyatt I*.

Hyatt disparages FTB's "continued insistence on application of California's law of sovereign immunity," and dismisses "mandatory comity" as an oxymoron. Opp.13-14, 17. But FTB does not seek application of California's sovereign immunity rule; it seeks application of *Nevada's* sovereign immunity rule. And there is no reason why comity (or full faith and credit principles) cannot give rise to a bright-line rule that sister sovereigns haled into court against their will receive at least the same immunities as a home-state agency under comparable circumstances. Indeed, if comity, full faith and credit, and *Hyatt I* do not embody even that minimal protection for a sister sovereign, then *Nevada v. Hall* is not just flawed but wholly unsustainable.

III. This Court Should Grant Review To Overrule *Nevada v. Hall*.

Faced with powerful historical and doctrinal evidence that *Nevada v. Hall* was wrongly decided and some forty States asking this Court to revisit it, Hyatt makes only a perfunctory attempt to defend *Hall* as

correctly decided. Instead, he emphasizes *stare decisis*, Opp.20-21, hoping this Court will remain "consciously wrong today because [it] was unconsciously wrong yesterday," *Massachusetts v. United States*, 333 U.S. 611, 639-40 (1948) (Jackson, J., dissenting). But Hyatt fails to acknowledge that almost every *stare decisis* consideration militates *against* retaining *Hall*. Pet.35.[2]

Hyatt claims, remarkably, that in exposing sovereign States to suit without their consent and threatening them with crushing liability, *Hall* "caused no problem that this Court needs to address." Opp.21. At least forty States—including Nevada itself—beg to differ. *See* States' Br.1-2, 18-25. This case illustrates why: a private individual has dragged a sovereign State through ten years of pretrial litigation, a four-month trial resulting in a nearly half-*billion* dollar verdict, another seven years (and counting) of post-trial litigation, and the possibility of a new trial. This ongoing saga has not only demeaned the State's sovereign dignity, but also subjected it to untold financial and administrative burdens. Pet.32-34; States' Br.19-23.

Both the support of forty States and Hyatt's defense of the decision below belie his claim (at 21) that the "voluntary doctrine of comity" sufficiently protects State sovereignty. If "comity" really is as voluntary as Hyatt insists, then it is a wholly

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[2] Hyatt identifies no vehicle issue impeding review. He faults FTB (at 20 n.6) for failing to press this question in *Hyatt I*, but correctly concedes that sovereign immunity can be raised at any time, *see Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974), and does not dispute that the issue was raised below.

insufficient substitute for the sovereign immunity implicit in the constitutional design that *Hall* eliminated.

While this case is an unusually egregious example, similar suits against non-consenting sovereign States are nowhere near as "rare" as Hyatt imagines, Opp.21. *See, e.g.*, *Montaño v. Frezza*, ___ P.3d ___, 2015 WL 1275366 (N.M. Ct. App. Mar. 19, 2015); *Atl. Coast Conference v. Univ. of Md.*, 751 S.E.2d 612 (N.C. Ct. App. 2013); *Athay v. Stacey*, 196 P.3d 325 (Idaho 2008). Indeed, Nevada itself has a pending petition for certiorari asking this Court to reconsider *Hall*. *See Nevada v. City & Cnty. of S.F.*, No. 14-1073, 2015 WL 981686 (Mar. 4, 2015).[3] Nor is there any reason to think that tax authorities will suddenly become popular with out-of-state juries, or that individuals reaping windfalls will not be tempted to assert that their move to a low-tax jurisdiction predated their windfall. The problems engendered by *Hall* are real and are not going away. *See* Multistate Tax Comm'n Br.3-7.[4]

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[3] Nevada's petition confirms that *Hall* should be reconsidered, but the Court should not grant that petition as an alternative to this one. Among other things, respondent there claims that the decision rests on an adequate and independent state procedural ground. This case involves no comparable objection and, more importantly, allows the Court to consider the continuing viability of *Hall* in conjunction with the comity and full faith issues raised in question two. As noted, if those doctrines really are as toothless as Hyatt insists, that provides an additional justification for overruling *Hall*.

[4] Hyatt alludes to two previous unsuccessful efforts to seek *Hall*'s demise. But this Court has not considered such a petition for nearly a decade, and both earlier efforts were undesirable

On *Hall*'s merits, the brief in opposition speaks louder by its silence than its words. Hyatt does not contest that *Hall* runs contrary to the Framers' understanding that one State cannot be sued in another State's courts absent consent, or that allowing such suits in another State's courts but not federal courts defies reason. Pet.28-30; States' Br.9-17. And he has no response to this Court's numerous cases explaining that a State "cannot be sued in its own courts, *or in any other*, without its consent and permission." *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858) (emphasis added); Pet.26, 30; States' Br.17-18.

Hyatt contends (at 21-22) that *Hall* does not conflict with *Alden v. Maine*, 527 U.S. 706 (1999). That argument misses the point. If *Alden* had overruled *Hall* rather than distinguished it, this case would have been dismissed a decade and a half ago. *Alden* clearly resolved a different issue, but its reasoning echoes the *Hall* dissent and underscores *Hall*'s incompatibility with a whole host of sovereign immunity decisions that followed it. If sovereign immunity is understood as narrowly demarcated by the metes and bounds of the Eleventh Amendment's text, then *Hall* may be defensible. But once sovereign immunity is understood as a "fundamental postulate[]

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vehicles and predated subsequent developments in sovereign immunity law. In one, a state agency insisted on greater sovereign immunity in its sister sovereign's courts than it would enjoy in its own courts. *Mont. Bd. of Invs. v. Deutsche Bank Sec.*, 549 U.S. 1095 (2006). The other was filed only shortly after *Alden v. Maine*, 527 U.S. 706 (1999), clarified the contours of State sovereign immunity, and involved a *pro se* respondent. *Illinois v. McDonnell*, 513 U.S. 819 (2000).

implicit in the constitutional design" that derives not exclusively from the Eleventh Amendment but "from the structure of the original Constitution itself," *id.* at 728-29, then *Hall* is wholly unsustainable. *See* Pet.30-31. Contrary to this now-established view, *Hall* explicitly refused to acknowledge any immunity "by inference from the structure of our Constitution," and intentionally departed from "the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." 440 U.S. at 418, 426.

Hyatt also suggests that sovereign immunity in this context is not an "absolute right" but merely a "matter of comity," which Hyatt insists is a wholly voluntary concept. Opp.22. That may be true for foreign nations, *Republic of Arg. v. NML Capital*, 134 S. Ct. 2250, 2255 (2014); but it is emphatically *not* true for the several States, whose sovereign immunity is guaranteed by the Constitution. *See Alden*, 527 U.S. at 728-29. The very dissenting opinion Hyatt cites recognizes this critical distinction. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2046-47 & n.1 (2014) (Thomas, J., dissenting) (explaining that while sovereign immunity normally is not a freestanding right, "State sovereign immunity is an exception" because it is "secured by the Constitution").

Grasping at straws, Hyatt asserts that there is no need for this Court to overturn *Hall* because States could "enter into an agreement to provide immunity in each other's courts." Opp.22 n.7. But that patchwork solution gets sovereign immunity exactly backwards. State sovereign immunity is the baseline guaranteed to the States by the Constitution's structure. A State can make a special, voluntary agreement to *waive* that

immunity, *see Edelman v. Jordan*, 415 U.S. 651, 673 (1974), and as a sovereign, it may do so without anyone else's consent. But as a sovereign, it hardly needs a special agreement or anyone else's consent to *assert* that immunity. If the problems of *Hall* can only be solved by a novel use of the Compact Clause, that is yet another in the long line of reasons to overrule *Hall*.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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